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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

R. ANTHONY MARRESE, M.D., and BONE AND JOINT SURGEONS, INC.

Petitioners,

v.

INTERQUAL, INC., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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32 pp

QUESTIONS PRESENTED

1. Does a state's authorization of medical peer review committees, combined with a grant of civil immunity for the good faith determinations and actions of such committees, constitute a clear articulation and affirmative expression of state policy in favor of group boycotts and other anticompetitive conduct sufficient to satisfy the "clear articulation and affirmative expression" requirement for state action immunity from federal antitrust liability?

2. Does a state "actively supervise" the medical peer review procedure as required for the application of state action antitrust immunity when no state agency has the authority to control the actions or affect the decisions of a medical peer review committee?

3. Does the possibility of state court review of the good faith of medical peer review committee proceedings constitute "active state supervision" for purposes of state action antitrust immunity?

4. Does the possibility of a restriction of peer review by the application of the federal antitrust laws bear upon the determination of whether peer review activities constitute state action so as to immunize such activities from those laws?

PARTIES TO THE PROCEEDINGS

R. ANTHONY MARRESE, M.D., and BONE & JOINT SURGEONS, INC., an Indiana corporation,

Petitioners,

v.

INTERQUAL, Inc., a Delaware corporation,

and

DEACONESS HOSPITAL, an Indiana not-for-profit corporation,

and

WILLIAM H. ALLEN, M.D., BRYANT A. BLOSS, M.D., THOMAS EVANS, M.D., AHMET K. PERCIEL, M.D., PEDRO DOMINQUEZ, M.D., SAM B. BAKER, M.D., KENNETH NACHTNEBEL, M.D., DAVID A. JOHNSON and JOHN RENDER,

and

C. LE ROY ANDERSON, DAVID L. BARNING, C. JACKSON BUSCHKILL, MRS. JEAN G. DREMSTEDT, GERALD M. FINNEY, PHILLIP J. GEIER, MELVIN L. KALLENBACH, WILLIAM L. KECK, ROBERT L. KOCH, WILLIAM D. POWELL, DONALD A. RAUSCH, BERNARD E. SCHACKE, DONALD E. STEEDLY, D.W. VAUGHN, and JAMES W. VOGEL,

Respondents.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, R. ANTHONY MARRESE, M.D. ("Dr. Marrese"), and BONE & JOINT SURGEONS, INC., hereby respectfully request that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit entered on November 6, 1984, as corrected on November 7, 1984.

OPINION BELOW

The decision of the Court of Appeals is reported at 748 F.2d 373 (1984) and appears as Appendix 1-44 in its corrected form.

JURISDICTION

This appeal is taken from a judgment entered on November 6, 1984, and amended on November 7, 1984, by the United States Court of Appeals for the Seventh Circuit. A timely petition for rehearing with suggestion for rehearing in banc was denied on December 27, 1984.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Ind. Code §§ 34-4-12.6-1 to 4; Ind. Code § 25-22.5-2-1; Ind. Code § 25-22.5-2-7; Ind. Code § 25-22.5-3-1; Ind. Code § 25-22.5-6-2.1; Ind. Code § 25-22.5-6-3; Ind. Code § 16-10-1-1; Ind. Code § 16-10-1-10; Ind. Code § 16-10-1-2; Ind. Code § 16-10-1-3; Ind. Code § 16-10-1-11; Ind. Code 16-10-1-6.5; Ind. Code § 16-10-1-6.5 (April 1983 amendment) and 410 Ind. Adm. Code 15-1-8(c) are set forth in the Appendix at pp. 127-144.

STATEMENT OF THE CASE

A) PROCEDURAL STATUS

On February 28, 1983, the District Court dismissed petitioners' First Amended Complaint because the facts alleged did not support the proposition that the restraint upon petitioners' practice caused more than an insubstantial effect upon interstate commerce (App. 95-96). On March 18, 1983, that Court denied the petitioners' motion for leave to file a Second Amended Complaint which contained additional jurisdictional allegations (App. 121). A timely appeal was taken from the District Court rulings and the jurisdictional issues were argued before the Seventh Circuit Court of Appeals on March 29, 1984. On August 10, 1984, the Circuit Court, *sua sponte,* ordered briefing on the additional issues of whether the respondents' actions enjoyed immunity from the federal antitrust laws due to the state action exemption doctrine and whether the petitioners' allegations of anticompetitive motivation were relevant and appropriately pleaded (App. 45-46). After briefs were filed, but without an evidentiary hearing in the District Court on the extent and nature, if any, of the State of Indiana's supervision of a private hospital's peer review process, the Seventh Circuit found that, although the petitioners had alleged facts sufficient, at the pleading stage, to establish the jurisdictional requirements of interstate commerce under the Sherman Act (App. 18-20), the respondents' conduct was exempt from the federal antitrust laws under the doctrine of "state action" immunity (App. 42-44). That court, therefore, affirmed the dismissal of this action brought under Sections 1 and 2 of the Sherman Act (App. 1).

B) THE PARTIES

Petitioner, Dr. Marrese, is a 42 year-old board-certified orthopaedic surgeon licensed to practice medicine in the states of Indiana and Illinois, employed by Petitioner, Bone & Joint Surgeons, Inc., an Indiana corporation with offices in Evansville, Indiana. Dr. Marrese graduated *magna cum laude* from Loyola Stritch School of Medicine in Chicago, Illinois, and, at

the same time, received a Masters of Science Degree in Physiology from the Graduate School of Loyola University. He interned at The John Hopkins Hospital in Baltimore, Maryland, and did his residency in orthopaedic surgery at the Northwestern University Hospitals (App. 99). Dr. Marrese has exhibited original scientific materials at numerous meeting of major medical associations from 1969 to 1982, and in November 1983 delivered a paper at Indiana University on the use of thermography in the diagnosis of spinal disc disease. In addition, he is the holder of three original patents on antipollution devices for anesthesia machines currently in use throughout the United States. In 1981, he received the Humanitarian Award of the City of Evansville, the only community from which he practiced medicine until his exclusion from the medical staff of respondent, Deaconess Hospital (the "Hospital").

The Hospital in Evansville, Indiana is a 650-bed institution possessing surgical and diagnostic facilities unique to the "tri-state area" of southern Indiana, western Kentucky and southern Illinois (App. 102, 116). When Dr. Marrese began his medical practice in Evansville in 1973 as an employee and thereafter as a partner of another orthopaedic surgeon on the staff of the Hospital, he was granted full professional medical staff privileges. In 1975, he became a self-employed orthopaedic surgeon employed by his solely owned corporation, Bone and Joint Surgeons, Inc., and continued to hold staff privileges at the Hospital.

C) MEDICAL PEER REVIEW AND THE DEACONESS HOSPITAL PROCEEDINGS

The Indiana Legislature has authorized a hospital's professional staff to establish a committee to evaluate the patient care rendered by members of its staff. Ind. Code §§ 34-4-12.6-1 to 4. It has extended state court immunity from civil liability to the statements or determinations of persons who participate in this peer review process, provided that their statements or

determinations in the course of such proceedings are made "in good faith." Ind. Code 34-4-12.6-3. The Hospital has established a procedure for one internal evidentiary hearing and one so called review proceeding (also internal) after any adverse action against a medical practitioner by the medical executive committee or the board of directors of the Hospital (App. 73, 74).

Dr. Marrese's troubles at the Hospital began shortly after he questioned Hospital staff members about the denial of his application for membership in the American Academy of Orthopaedic Surgeons and expressed his intent to file a state court action which was the predecessor to a case known to this Court as *Marrese, et al. v. American Academy of Orthopaedic Surgeons,* ____ S. Ct. ____, 83-1452 (March 4, 1985) (Justice Burger, concurring in the Judgment). In February 1978, the chairman of the Hospital's medical staff executive committee recommended that an audit be conducted by the Hospital's medical audit committee of all back surgeries performed at the Hospital (App. 109). When it was discovered that Dr. Marrese was a member of the medical audit committee, a special ad hoc committee (the "SAHC") was established to perform the audit.

Although there were approximately three times as many lumbar laminectomies as spinal fusions performed at the Hospital during the audited period, SAHC audited 50 lumbar laminectomies and 40 spinal fusions, knowing full well that Dr. Marrese performed the vast majority of spinal fusions at the Hospital (App. 110). Notwithstanding the fact that only 68 percent of the lumbar laminectomies audited met nationally established criteria, SAHC approved the lumbar laminectomies performed by the Hospital staff. Only 2 of the 50 audited laminectomies were performed by Dr. Marrese, and both of those surgeries met all nationwide and areawide criteria in addition to those adopted by the audit committee. Of the 40 spinal fusions audited by SAHC, 32 were performed by Dr. Marrese and these, too, met all nationwide and areawide professional criteria. Nonetheless, SAHC elected to examine

these operations by the arbitrary and inherently subjective criterion of what it considered to be the "appropriateness"—though not the excellent results—of Dr. Marrese's surgical procedures (App. 110).

Although there had never been any patient complaints about Dr. Marrese's surgeries, SAHC recommended that all of Dr. Marrese's laminectomies and spinal fusions should be monitored and that those of his cases which did not have positive radiological findings should be subjected to a mandatory second opinion. However, final action was never taken by the medical staff executive committee on this SAHC recommendation. SAHC then sent 8 of Dr. Marrese's 32 spinal fusions to an outside auditor, who could draw no conclusions about Dr. Marrese's surgical procedures. Instead, he recommended that *all* spinal procedures performed by orthopaedists and neurosurgeons at the Hospital be submitted to outside audits. The medical staff executive committee likewise declined to act on this recommendation (App. 111).

In August 1981, the medical staff executive committee sought out the service of respondent, InterQual, Inc., of Chicago, Illinois ("InterQual") to audit *only* Dr. Marrese's spinal procedures. InterQual conducted an off-site evaluation of 93 of Dr. Marrese's procedures and in early 1982 submitted its report to the medical staff executive committee. The petitioners have alleged that this report was seriously flawed because it employed no published criteria, misstated the medical records, ignored reports when the record under review referred to additional available reports justifying the surgery, failed to obtain or consider the patient charts or review x-ray pictures, suggested "Fourth Generation C.T. scans" when such procedures were not technically available during the period in question and contained so many clerical and interpretive errors that it reflected a total lack of good faith and conspiratorial malice towards Dr. Marrese (App. 112-113).

In March 1982, more than six months after this secret InterQual audit, Dr. Marrese was first advised that selected spinal surgeries performed by him had been reviewed by that out-of-state company. On April 28, 1982, he was advised that the medical staff executive committee had recommended the revocation of his staff membership and clinical privileges on the basis of the InterQual report (App. 113, 150-151).

Dr. Marrese immediately demanded a hearing pursuant to the Hospital's "Fair Hearing Plan" (App. 73-79). On July 9, 1982, he was advised that a hearing would be held at the Hospital on July 24, 1982. However on July 12, 1982, this lawsuit was filed and the medical staff executive committee cancelled the hearing. The District Court dismissed Dr. Marrese's Amended Complaint on February 28, 1983, and Petitioners' Notice of Appeal was filed on March 25, 1983. On May 18, 1983, Dr. Marrese was advised that his previously cancelled hearing had been rescheduled for July 9th and 10th, 1983. In the same correspondence he was also advised of the composition of the hearing panel, that the Hospital Medical Staff did not intend to introduce *any* evidence on the cases examined by InterQual (even though the InterQual report had formed the basis of the medical staff executive committee's adverse recommendation) but that the committee had instead decided to amend the charges to add new allegations against him (App. 152).

Dr. Marrese objected to the composition of this new hearing panel, all the members of which were appointed by the president of the medical staff, a defendant in this litigation, and the procedural hearing officer, another defendant herein. His objections to the hearing panel were based upon the fact that one of the five panel members was a father of a witness scheduled to testify against him at the hearing and a partner of the same defendant who had appointed the panel; two other members of the panel were also partners of defendants in this litigation, all of whom were scheduled to testify against Dr. Marrese; another member had a strong personal bias against

orthopaedic surgeons performing spinal surgery; and the last member was a family practitioner with no expertise whatsoever in the surgical specialty he was called upon to evaluate (App. 152-153). Because no action was taken by the Hospital in response to these objections, Dr. Marrese filed a suit for preliminary injunction in the Indiana state court on July 7, 1983. On July 8, 1983, that Court held a hearing and entered an order denying Dr. Marrese's request for injunctive relief (App. 152).[1] On that same day, one of the panel members who was a partner of a defendant in this litigation and a witness scheduled to testify, voluntarily withdrew from the hearing panel. The Hospital Medical Staff then recommended the appointment to the hearing panel of another defendant in this litigation. The Circuit Judge, hearing the preliminary injunction case, approved the Hospital's recommendation, but, on the morning of the hearing, off the record, withdrew that approval.

The hearing proceeded for sixteen hours on July 9, 1983, and nine hours on July 10, 1983, with a panel of four, rather than the five members called for in the Hearing Plan (App. 77). A defendant in this litigation continued to serve as the procedural hearing officer. Notwithstanding the testimony of a nationally recognized neurosurgeon, a nationally recognized radiologist and a nationally recognized orthopaedic surgeon that all of Dr. Marrese's surgical procedures were properly performed, and notwithstanding what can only be described as a lack of any credible evidence to the contrary, the hearing panel, on September 14, 1983, recommended that Dr. Marrese's staff membership and clinical privileges at the Hospital be terminated. His clinical privileges were immediately terminated, and on October 23, 1983, the Hospital's board of directors, sitting as an "appellate review" panel, ratified the action of the Hospital's peer review committee and immediately

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[1] A subsequent appeal of that order to the Indiana Court of Appeals was dismissed because the issues raised were considered moot (App. 156-157).

terminated Dr. Marrese's staff membership. Dr. Marrese has not practiced at the Hospital since that date, and in fact, no longer holds any hospital privileges in Evansville, Indiana.

D) THE INDIANA MEDICAL LICENSING BOARD

There were no representatives of the Indiana Medical Licensing Board or any other state agency on the Hospital's peer review committee nor did that Board or any state agency have authority to place a representative on that committee. The recommendation of the committee became effective without any action by the Indiana Medical Licensing Board or any other state agency, and no agency of the State of Indiana had or has any authority to review, affirm or reverse the decision of the Hospital's peer review committee.

The Hospital's board of directors reported to the Indiana Medical Licensing Board, as required, the results and circumstances of the decision to revoke Dr. Marrese's medical staff privileges. Ind. Code § 16-10-1-6.5(b). The Licensing Board, consisting of seven members appointed by the Governor of Indiana (Ind. Code § 25-22.5-2-1), is empowered to revoke a practitioner's license or else to suspend, censure or place a medical practitioner on probation pursuant to Ind. Code § 25-22.5-6-2.1. When the Hospital's governing board advised the Indiana Medical Licensing Board of the action which it had taken against Dr. Marrese, that report was given no greater weight than any other complaint made by any other person against a medical practitioner. Ind. Code § 25-1-7.5(1). The report of the Hospital still awaits a recommendation from the Indiana Attorney General's office as to whether or not it wishes to prosecute Dr. Marrese pursuant to Ind. Code § 25-1-7-7(a).

E) THE HOSPITAL LICENSING COUNCIL

There also exists in the State of Indiana a State Board of Health which, through a Hospital Licensing Council consisting of eight members appointed by the Governor of that state, is

empowered to license and regulate hospitals and ambulatory out-patient surgical centers. That Council has the power to suspend or revoke a hospital's license for conduct or practices found by the Council to be detrimental to the welfare of its patients. Ind. Code § 16-10-1-3-10. If applicants or holders of a hospital or ambulatory care license are aggrieved by the action of the Hospital Licensing Council and the Board of Health, they are authorized by Indiana statute to appeal such decisions to a state court. Ind. Code 16-10-1-11.

While the Hospital Licensing Council is entitled to review the confidential minutes of meetings of a peer review committee, it reviews this information for purposes entirely unrelated to the peer review process. Its review is part of its compilation of information germane to its recommendation to the State Board of Health regarding annual hospital license renewal. The Licensing Council plays no role in the peer review process and has no authority to affect the decision of a peer review committee to revoke a particular doctor's staff membership or clinical privileges.

F) STATE COURT IMMUNITY FOR PEER REVIEW PROCEEDINGS CONDUCTED IN GOOD FAITH

The legislature of the State of Indiana has extended state court immunity to persons involved in peer review proceedings only to the extent that their activities are conducted in good faith. Ind. Code § 34-4-12.6-3. Unlike the Hospital Licensing Act there is no provision in the Peer Review Act limiting appeals to the state courts of Indiana. On the issue of the lack of good faith of the Hospital's peer review committee the petitioners have alleged that Dr. Marrese's exclusion from the medical staff of the Hospital was the result of the following underlying anticompetitive conspiracies, all of which were conducted in the utmost *bad* faith:

> One: Defendants were seeking to exclude Dr. Marrese from the relevant market because of his opposition to their anticompetitive trade practices and because he was a serious competitive threat to the Defendants (App. 106).

Two: Defendants were competitively threatened because of Dr. Marrese's ability to attract more patients than any other physicians at the Hospital and because he refused to abide by certain anticompetitive trade practices that were present there and throughout the relevant market (App. 107).

Three: Defendants' efforts to exclude Dr. Marrese were motivated by his vigorous competitive behavior including his treatment of other doctors' patients without a referral from them and his refusal to share his practice with other orthopaedic surgeons (App. 113).

Four: The Defendants feared Dr. Marrese's competition because he was capable of performing surgical procedures that his local competitors were unable to perform. He was therefore charged with doing "too many" backs (App. 109-113).

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S OPINION ESTABLISHES A NEW AND INAPPROPRIATE TEST FOR STATE ACTION IMMUNITY WHICH SUBSTITUTES WHAT IT CONSIDERS TO BE PERVASIVE REGULATION OF A PROFESSION FOR THE *PARKER* REQUISITE OF STATE COMPULSION OF THE CHALLENGED OF ANTICOMPETITIVE CONDUCT, OR AT THE VERY LEAST, A REASONABLE AND NECESSARY RELATIONSHIP BETWEEN THE CLEARLY ARTICULATED STATE POLICY AND THAT ANTICOMPETITIVE CONDUCT.

The appropriate analysis for anticompetitive action by private parties in determining the applicability of the state action immunity doctrine is presently the subject of considerable debate among the circuits notwithstanding this Court's decision in *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), which announced that "[t]he threshold inquiry in determining if an anticompetitive activity is State action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign." *Id.* at 790.

Applying this test, the majority in *United States v. Southern Motor Carriers Rate Conference,* 702 F.2d 532 (5th Cir. 1983), *cert. granted,* 52 U.S.L.W. 3891 (June 11, 1984) (No. 82-1922), held that a private party is immune from federal antitrust liability only if the state *compels* the specific anticompetitive conduct at issue, writing: "So long as the State merely allows, but does not compel, anticompetitive conduct, the decision to adopt such conduct remains that of the individual and is within the scope of the Sherman Act." *Id.* 537. This Court has also found that actions undertaken pursuant to a "clearly articulated and affirmatively expressed state policy to replace competition with regulation" meet this threshold standard. *Hoover v. Ronwin* ____ U.S. ____, 104 S. Ct. 1989, 1995 (1984); *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.* 445 U.S. 97, 105 (1980).

On the other hand, the Second Circuit in *Capital Telephone Co. v. New York Telephone Co.*, No. 84-7176 (2d Cir. Dec. 18, 1984), rejected the "compulsion" test in favor of a broader standard which attempts to determine whether the challenged restraint of competition is "reasonably necessary or related to the subject of the legislation." *Id.*, Slip. Op. at 890. The Sixth Circuit has also adopted a similar "relationship" test for evaluating challenges to conduct by public parties: the challenged restraints must be a reasonable and foreseeable exercise of an agency's delegated powers and must be reasonably designed to promote the State's policy within a designated field of regulation. In that event, a presumption arises that the restraints stem from a "clearly and affirmatively expressed State policy to displace competition," through regulation. *Hybud Equipment Corp. v. City of Akron*, 742 F.2d 949, 960-61 (6th Cir. 1984); *see also U.S. v. Title Ins. Ruling Bureau of Ariz., Inc.* 700 F.2d, 1247, 1252-53 (9th Cir. 1983), *cert. denied.*, 52 U.S.L.W. 3891. (June 11, 1984).

These standards have evolved from a line of this Court's decisions beginning with *Parker v. Brown*, 317 U.S. 341 (1943), and most recently continued in *Hoover v. Ronwin*, ____ U.S. ____, 104 S.Ct. 1989 (1984). These cases teach that the ultimate goal of State action immunity is to "preserve the principles of state sovereignty and federalism without disregarding the procompetitive, free enterprise values embodies in the federal antitrust laws." *Marrese v. InterQual*, 748 F.2d 373, 386 (7th Cir. 1984) (App. 26). While there is a continuing dispute about the exact degree of state compulsion that is required in order for private parties' actions to become immune from the federal antitrust laws, the conspicuous fact is that under *any* of these standards the State of Indiana has not "clearly articulated and affirmatively expressed" a state policy to eliminate competition in the manner that it is alleged to have occurred in this case, nor was the conduct of respondents a reasonable and necessary outgrowth of the peer review process.

The Seventh Circuit has apparently failed to recognize that "pervasive regulation" of a profession in general is insufficient evidence of legislative intent to displace competition with private conspiracies in restraint of trade under the guise of legitimate peer review. *National Gerimedical Hospital v. Blue Cross of Kansas City,* 452 U.S. 378, 388-390 (1981); *Otter Trail Power Co. v. United States,* 410 U.S. 366, 372-375 (1973); *Northcrop Corp. v. McDonnell Douglas Corp.,* 705 F.2d 1030, 1056 (9th Cir. 1983) *cert. denied,* 52 U.S.L.W. 3265 (Oct. 3, 1983); *Phonetele, Inc. v. AT&T,* 664 F.2d 716, 729 (9th Cir. 1981), *cert. denied,* 459 U.S. 1144 (1983). *See also* Areeda, *Antitrust Immunity for "State Action" After Lafayette,* 95 Harv. L. Rev. 435, 438 (1981).

In the instant case, the Seventh Circuit has erroneously concluded that the anticompetitive activities at issue are "clearly articulated and affirmatively expressed" as Indiana's state policy. *Marrese v. Interqual, Inc.* (App. 30). But the Seventh Circuit confuses an Indiana policy favoring peer review committees to promote quality medical care with the necessary "clear and affirmative" expression of legislative support for the particular anticompetitive conduct undertaken by the respondents. Thus, the opinion states:

> The State of Indiana has "clearly articulated and affirmatively expressed as state policy" that hospital medical staffs are to form peer review committees and that such committees are to review the quality and necessity of the care provided patients, to evaluate the qualifications of staff members, and review the merits of any recommendation against a staff member. Ind. Code §§ 16-10-1-6.5, 34-4-12.6-1. As a necessary and reasonable consequence of this state mandated medical peer review process, hospital staff members must review the medical treatments, diagnostic procedures, and surgical procedures of competing staff members and, when required, recommend the revocation of staff privileges. Thus, the defendants' conduct, as members of or consultants to the hospital board, the SAHC, and the Medical Staff Executive Council, in reviewing Dr. Marrese's surgical procedures and recommending that his staff privileges be revoked satisfies the first element of the Parker test. (App.30)

This analysis misconstrues the true nature of the so-called *Parker* test, which seeks to ensure that the challenged activity is truly that of the state and therefore entitled to immunity, rather than that of a private association attempting to use its power to restrain competition at the expense of the public interest. *See Hoover v. Ronwin*, ____ U.S. ____, 104 S.Ct. 1989, 2004 (1984) (Stevens, J., dissenting); Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 Harv.L.Rev. 435, 437-438 (1981).

Because of the overriding importance of the procompetition policy embodied in the federal antitrust statutes, this Court has consistently required a *very specifically expressed* state policy in favor of the alleged anticompetitive action in order to satisfy this first requirement for *Parker* immunity. Thus, in *California Liquor Dealers v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980), this Court found that the challenged pricing system was clearly the policy of the State of California, "forthrightly stated and clear in its purpose to permit resale price maintenance." 445 U.S. at 105. Similarly, in *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978), this Court found a "clearly articulated and affirmatively expressed" state policy to "displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships." Therefore, it found that a comprehensive state-supervised program requiring state approval of the location of automobile dealerships, which necessarily replaced "unfettered business freedom," was immune from Sherman Act liability.

The state policies in *Midcal Aluminum* and *New Motor Vehicle Board* specifically referred to the challenged conduct. By contrast, no such anticompetitive restraints are stated as the policy of the State of Indiana. On the contrary, the state policy in question is the promotion of quality medical care through peer review procedures, and to that end the Indiana legislature has expressly required that such procedures be conducted in "good faith" if they are to enjoy even a state law civil

immunity. This policy cannot reasonably be read as an all-encompassing effort to replace competition with regulation.

If competition were inconsistent with Indiana's state policy, then a far more comprehensive regulatory scheme would have been adopted. Instead, Indiana's legislative policy presumes that competition will continue to exist in the Indiana medical community. Accordingly, competitive forces, not state law, are supposed to regulate the number of licensed physicians practicing in a given specialty, in a given region, or indeed in a given hospital. The State makes no attempt to set minimum or maximum fees; competition determines the fees a physician can charge. Finally, Indiana law does not even authorize, much less, compel, a group boycott against a physician for specifically anticompetitive purposes.

Even if this Court applies the "reasonable relationship" test of *Capital Telephone* and *Hybud, supra,* to the instant case, which involves purely private activity, the activity at issue here is still not immune from antitrust liability. Petitioners have alleged that the respondents engaged in a horizontal group boycott through a concerted refusal to deal (App. 112), that they have attempted to reduce the output of surgical services by the application of arbitrary and restrictive criteria as determined and applied by direct competitors of the petitioners (App. 110), and that they have likewise attempted to coerce conformity to a local "shared equipment system" (App. 108) and a local "prior referral" system (App. 108), all with the intent to monopolize the relevant market (App. 114). Such action is *not* a necessary or reasonable consequence of the legitimate peer review process, which was intended by the Indiana legislature to be conducted in good faith; the medical peer review process as contemplated by the Indiana legislature can be conducted, *and was intended by the legislature to be conducted,* without violating the Sherman Act.

This same element of statutory intent is a critical distinction between *Southern Motor Carriers, supra,* and this case. In

Southern Motor Carrier, the respective States had specifically approved the submission of joint rate schedules to the state regulatory commissions. *United States v. Southern Motor Carrier Rate Commission,* 467 F.Supp. 471, 475-76 (N.D. Ga. 1979). By contrast, in the present case, as demonstrated above, the State of Indiana has *not* authorized the anticompetitive conduct challenged by Dr. Marrese and this conduct was *not* a reasonably necessary result of peer review.

By thus misconstruing the applicable law concerning the "clearly articulated and affirmatively expressed" requirements the Seventh Circuit has in effect removed from antitrust regulation an entire branch of professional anticompetitive conduct solely because of the unquestioned state interest in the delivery of quality medical services. The circuit court's message is clear: the federal antitrust laws and their overriding policy in favor of competition are dead as they relate to medical peer review in the Seventh Circuit. Because of a state's unquestioned interest in quality medical care, all manner of specifically anticompetitive practices within the medical profession are now to be insulated from antitrust scrutiny. Such an approach will have a disastrous impact on price and quality competition in the medical field and can only harm the consumer—the very person whom Indiana's policy seeks to protect.

II. THE SEVENTH CIRCUIT'S FINDING OR *PARKER* IMMUNITY WHEN THE MEDICAL PEER REVIEW PROCESS IS UNSUPERVISED BY ANY STATE AGENCY AND THE STATE'S ROLE IN SUPERVISING THE MEDICAL PROFESSION IS ENTIRELY UNRELATED TO THE PEER REVIEW PROCESS, IGNORES THE PURPOSE OF THE STATE ACTION DOCTRINE, WHICH IS TO IMMUNIZE FROM ANTITRUST LIABILITY ACTIONS WHICH ARE TRULY THOSE OF THE STATE ACTING AS SOVEREIGN.

The supervision requirement for *Parker* immunity reflects a concern with the risks of private abuse of state-created

regulatory schemes. Active state involvement is expected to reduce the temptation for private gain. *See generally* Areeda, *Antitrust Immunity for 'State Action' After Lafayette,* 95 Harv.L.Rev. 435 (1981). Where there is no such supervision, the improper exercise of delegated authority is indistinguishable from any other conduct violative of the antitrust laws. As Justice Stevens observed in *Hoover v. Ronwin:*

> Experience in the administration of the Sherman Act has demonstrated that there is a real risk that private associations that purport merely to regulate professional standards may in fact use their powers to restrain competition which threatens their members.

104 S.Ct. at 2012 (Stevens, J., dissenting).

In the instant case, the Seventh Circuit has erroneously concluded that the respondents' anticompetitive conduct is subject to sufficient "active state supervision" to immunize it from Sherman Act liability. *Marrese v. Interqual* (App. 34-35). This "supervision," as described by the Circuit Court, consists of a possible *de novo* hearing before the Indiana Medical Licensing Board on the issue of the possible revocation of Dr. Marrese's license and before the Hospital Licensing Council on the issue of the possible revocation of the Hospital's license for its alleged failure to review the professional practices in the Hospital for the purposes of reducing morbidity and mortality and improving the care of patients. Ind. Code 16-10-1-6.5. In this regard, the Circuit Court has totally misconstrued the "active state supervision" requirement for *Parker* immunity.

This second requirement is properly viewed as inextricably connected with the first requirement, that the challenged activities must be "compelled" by the state or at least undertaken pursuant to a "clearly articulated and affirmatively expressed state policy to displace competition with regulation." As with the first requirement, the "active state supervision requirement relates to the particular activities in question not, as the Seventh Circuit suggests, to the supposed pervasive regulation of the

entire medical profession. *See Hoover v. Ronwin*, ____ U.S. ____, 104 S.Ct. 1989. (1979), *California Retail Liquor Dealers, Ass'n. v. Midcal Aluminum, Inc.* 445 U.S. 97 (1980); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (plurality opinion); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 604) (Burger, C.J., concurring in part). In *Midcal Aluminum*, for example, the challenged resale price maintenance scheme was found to be the specifically stated policy of the State of California. 445 U.S. at 105. Yet the state's failure to establish prices, review the reasonableness of price schedules, regulate the terms of fair trade contracts, monitor market conditions, and reexamine the program all indicated a lack of active state supervision of this policy. *Id.* at 105-106. In contrast, the challenged activity by the petitioner in *Hoover v. Ronwin* (bar admission procedures) was found to be sufficiently supervised by the state to impose antitrust immunity. ____ U.S. ____, 104 S. Ct. 1989. The Court found that the program in question "carefully reserves to the [State Supreme] Court the authority to make the decision to admit or deny [admission to the bar], and that decision is the critical state action here." *Id.* at 2001.

The review of peer review committee decisions or recommendations found to be "supervisory" by the Seventh Circuit is not supervision of that process at all, but instead relates only to the completely independent issue of whether or not a medical practitioner's or hospital's license should be revoked or suspended.

The Medical Licensing Board does not reexamine the peer review proceedings to determine their compliance with or deviation from state policy, nor does it have authority to review, reverse or affirm the decision of a peer review committee. Peer review committee decisions are implemented without the advice of the Medical Licensing Board; that Board's involvement with the peer review process is limited to its examination of committee records and reports for purposes unrelated to "peer review." The same is true of the review by the Indiana State

Board of Health and the Council appointed pursuant to Ind. Code § 16-10-1-3 of a hospital's overall health care practices: such generalized supervision of hospitals for purposes of license renewal simply has nothing to do with the active supervision of particular peer review proceedings.

The Fifth Circuit in *Southern Motor Carriers* did not find it necessary to reach the issue of supervision but even if this Court does examine the supervision question in that case, *Southern Motor Carriers* is factually distinguishable from this case. Under the regulatory schemes of the five states involved in *Southern Motor Carriers,* rate schedules and tariffs submitted to the various state commissioners could not take effect unless and until approved by those bodies. *United States v. Southern Motor Carriers Rate Conf., Inc.,* 467 F.Supp. 471, 476-78 (N.D.Ga. 1979). In the instant case, in complete contrast peer review committee findings and recommendations take effect without approval or even review by any state body.

This Court has decided cases at both ends of the "supervision" spectrum. In *Midcal Aluminum,* the facts presented indicated a complete lack of supervision over a resale price maintenance scheme. 445 U.S. at 105-106. *Hoover v. Ronwin,* on the other hand, presented a situation in which the challenged activity was, in essence, undertaken by the State through its Supreme Court. ____ U.S. ____, 104 S.Ct. at 2001. This case presents a unique opportunity to define the requisite degree of state supervision in the state action immunity area. There is nothing in the policy or legal precedent surrounding the state action doctrine to suggest that a state agency which conducts a *de novo* hearing on an issue not considered by the peer review committee, i.e., the medical practitioner's right to hold a state medical license, but *without the ability to affect the ultimate actions of the committee,* constitutes "active supervision" of the peer review process. The Seventh Circuit's decision in this case leaves the consumer without either the

benefits of competition or the protection of state regulation. Permitting respondents to cast the "gauzy cloak" of state action over their purely voluntary, unsupervised conduct fulfills neither the goals of *Parker* state action immunity, the mandate of the Sherman Act, nor the regulatory policy of the State of Indiana to provide the best available medical care to its residents.

III. THE SEVENTH CIRCUIT'S SUGGESTION THAT THE POSSIBLE REVIEW OF THE GOOD FAITH OF PEER REVIEW PROCEEDINGS BY STATE COURTS CONSTITUTES "ACTIVE STATE SUPERVISION" IS UNPRECEDENTED AND CONTRARY TO FEDERAL ANTITRUST POLICY. IT SUBSTITUTES A NEW RULE OF FEDERAL ABSENTION FOR THE ACTIVE STATE REGULATION THAT IS ESSENTIAL FOR STATE ACTION IMMUNITY FROM THE ANTITRUST LAW.

After inaccurately characterizing the function of the Indiana Medical Licensing Board and the Hospital Licensing Council as "active supervision" of the peer review process, the Seventh Circuit has further declared that the availability of a state court review of the requisite good faith of peer review proceedings comprises "an essential element of State mandated and supervised peer review process in the State." *Marrese v. InterQual* (App. 38) The Circuit Court does not explain this unheard-of interpretation in any detail, but implies that the ultimate resolution of peer review disputes—in essence, the only supervision of the process—rests with the Indiana state court system (App. 38-39). However, in construing the *Parker* doctrine, this Court has never equated judicial review of administrative proceedings, designed to protect due process rights guaranteed by the Fourteenth Amendment, with "active state supervision" of anticompetitive conduct.

The Indiana courts, pursuant to state law, review only the "good faith" of medical peer review committee members. Ind.

Code § 34-4-12.6-3. It is difficult to conceive of a more judicial and less legislative or administrative act. Yet, the Seventh Circuit suggests that this "review" immunizes respondents' anticompetitive acts from antitrust liability. This is an utterly unprecedented distortion of the "active supervision" requirement. The Indiana courts' role in the peer review process is purely judicial in nature. In fact, a court is constitutionally incapable of either implementing or supervising a state policy in favor of quality medical care through peer review, but is limited to an adjudication of the case or controversy placed before it by the parties.

Such an analysis of "active state supervision" to include judicial review by a state court of the "good faith" of a medical peer review panel, is more closely analagous to a new doctrine of federal judicial abstention than it is to a new test for the application of the state action immunity doctrine. Until this decision it had been assumed that federal courts did not dismiss lawsuits simply because state courts *might* entertain an action on the same facts. *Alabama Public Service Commission v. Southern Railroad Co.*, 341 U.S. 341, 361 (1951) (Justice Frankfurter, concurring in the result). This Court, in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814-816 (1976), very carefully drafted boundaries for the application of the judicial abstention doctrine, and this case clearly does not fall within any of the categories there established for the application of that doctrine.

Whether this case is viewed as setting forth a novel test for the application of the state action immunity doctrine or a novel approach to the application of the doctrine of federal abstention, the standard suggested by the Seventh Circuit leads to the improbable result of federal antitrust immunity for admittedly anticompetitive conduct. Permitting judicial review thus to replace "active supervision" of anticompetitive activity would serve only to facilitate violations of the federal antitrust laws by masking them with a limited state judicial finding of "good

faith." Such a finding does not and cannot constitute the necessary regulation or supervision of the peer review process by a State.

IV. THE POTENTIAL CONSTRAINTS ON MEDICAL PEER REVIEW RESULTING FROM APPLICATION OF THE FEDERAL ANTITRUST LAWS ARE AN INAPPROPRIATE FACTOR IN DETERMINING WHETHER STATE ACTION IMMUNITY EXISTS.

The Seventh Circuit's analysis of the state action immunity doctrine departs drastically from precedent in its assumption that a state policy generally favoring medical peer review may restrict federal antitrust policy whenever those policies conflict. *Marrese v. InterQual* (App. 42). The Circuit Court opines that "peer review is essential to the very life-blood and heartbeat of medical competency and quality medical care in the State of Indiana and throughout the nation." *Id.* at 37. The Court continues, "[A]n attack upon this state mandated and supervised peer review process, through the federal antitrust laws will compel able and qualified physicians to abdicate their participation in the review of hospital staff members." *Id.* at 42.

Whether or not this is true, the decision to elevate a state policy to the status of national policy restricting the scope of the Sherman Act is not one for any court to make. Rather, under the *Parker* doctrine, this Court has found that the all-important federal economic policy in favor of free competition was never intended to apply to the actions of the States acting as sovereigns. The confusion of the Seventh Circuit on this last point is obvious, for no state policy, however strong, can possibly displace the Sherman Act. *Parker v. Brown*, 317 U.S. 341, 351 (1943); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 602 (1975). Only "state action" can do so, pursuant to a clearly expressed state policy to replace competition, which is vigorously enforced, through a system of ongoing regulation, and there is no such system of regulation for peer review in the State of Indiana.

The Seventh Circuit's rationale in this case decimates the delicate balance struck by this Court in the area of state action immunity. It provides a virtual carte blanche for professions involved in what the courts may deem to be "important" areas of state policy to engage freely in anticompetitive conduct proscribed by the federal antitrust laws. Congress, in the Sherman Act, enunciated a national policy favoring competition as the means of protecting the welfare of consumers. It is not the role of the Seventh Circuit, nor of any other court, to decide that consumers may be better protected through other means. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1971).

CONCLUSION

Because there does not exist, in the State of Indiana, a "clearly articulated and affirmatively expressed" statutory policy to displace competition with regulation in the delivery of medical services to consumers, because the legislative authorized medical peer review process could have been successfully carried out and was intended to be carried out without a violation of the federal antitrust laws, and because the only possible "supervision" of the peer review process in this case consists of a possible state court judicial review, Petitioners respectfully pray that this unprecedented and fundamentally unsound decision of the Seventh Circuit be reviewed by this Court.

Respectfully submitted,

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